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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 617

ALGERNON BLAIR, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, and Opinion of the District Court of the United States for the Middle District of Alabama (R. 115-122) are reported at 66 F. Supp. 405. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 128-133) is reported at 164 F. 2d 115.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered on November 7, 1947 (R. 134). A petition for rehearing was denied on December 3, 1947 (R. 139). The petition for a writ of cer-

tiorari was filed on February 21, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the provisions of the contract documents here involved, pursuant to which petitioner undertook to "perform the work for construction" of a certain War Housing Project in Key West, Florida, petitioner was obligated to bear the expenses of repairing the damage caused by a hurricane—a not uncommon phenomenon in that area—to some of the houses, which at that time had neither been completed by him nor accepted as ready for occupancy by the United States.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract documents involved are set forth in the Appendix, *infra*, pp. 10-13.

STATEMENT

Briefly summarized, the undisputed facts are as follows:

Petitioner entered into a contract with the Federal Public Housing Authority on May 26, 1944, in which he agreed to "furnish the materials, and perform the work for construction of War Housing Project Fla.-8246, Key West, Florida" and for which he was to receive $267,360.00 (R. 67, 68). As part of this contract, petitioner was to disassemble certain government-owned prefabricated houses at Grenada, Mississippi, to move them to Key West, Florida, and there, to reconstruct and make them ready for occupancy (R. 129). The work under the contract was to begin on June 5, 1944 and to be completed by September 3, 1944 (R. 15-16, 116). By Change Order 15, dated March 5, 1945, however, the completion date was extended 108 days or until December 20, 1944 (R. 17-19, 116). Memoranda of acceptance for

occupancy of certain of the buildings were given to petitioner by the United States on October 13, 1944, November 24, 1944, November 29, 1944 and December 20, 1944 (R. 13-15, 20-26, 116).

On October 17 and 18, 1944, a hurricane struck Key West, Florida and caused considerable damages to the buildings petitioner was erecting. None of the buildings so damaged had been accepted by the United States,[1] although on the average, they were 97.1% reconstructed (R. 13-15, 20-26, 129). The contracting officer orally instructed petitioner to repair and replace damages caused by the storm, leaving the question of responsibility for the expenses to be determined later (R. 99, 129). By letter dated October 27, 1944, the contracting officer informed petitioner that under the contract, he was required to complete the project without any additional cost to the United States (R. 102-103). Petitioner repaired the damage at a cost of $10,643.00 including 10% for overhead and 15% for profit (R. 112-115), and appealed his claim to the head of the Housing Authority (R. 94-97, 129) who denied the appeal on December 26, 1944 (R. 104-112).

Petitioner on October 10, 1945 brought this suit against the United States under the Tucker Act (28 U. S. C. 41(20)) in the United States District Court for the Middle District of Alabama, Northern Division, seeking to recover the expenses he incurred for the repair of these damages (R. 1-6).[2] In its answer the United States defended on the grounds (1) that petitioner was required to repair the

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[1] The October 13 memorandum of acceptance related to a community building which was not affected by the hurricane. This memorandum was not approved by the contracting officer until October 31, 1944 (R. 14).

[2] The original complaint claimed expenses in the amount of $10,643.00 (R. 5). The United States thereupon moved to dismiss since the amount sought exceeded the maximum for which suit may be maintained under the Tucker Act (R. 6-7). Petitioner amended his complaint to reduce the recovery sought to $10,000.00 (R. 8-9).

damage and hence was not entitled to any additional compensation therefor (R. 12), and (2) that petitioner's authorized representative had issued a certificate of release whereby the United States was released from any and all claims of petitioner arising under or by virtue of the contract (R. 11). After hearing, the District Court held, without passing on the release defense of the Government, that petitioner was not entitled to recover, and ordered the complaint dismissed (R. 122).

Upon appeal, the court below held, contrary to the contentions of the United States, that the contract here involved was one of bailment (R. 130). It went on, however, to point out that although a bailee for hire is "liable only for ordinary negligence," he could by special provision of the contract enlarge his responsibility to the extent of securing the bailor against losses due to hurricane or any other cause (R. 131). Section 3 of Division DTH-1 of the contract involved in the present case, the court held, did so enlarge petitioner's responsibilities (R. 131-133). Accordingly, it affirmed the District Court's judgment. (R. 134).

ARGUMENT

On October 17 and 18, 1944, a hurricane struck Key West, Florida, damaging certain prefabricated houses, which petitioner under a contract with the United States had disassembled and moved from Grenada, Mississippi, and was then engaged in reconstructing and making ready for occupancy. Petitioner here seeks to recover from the United States the costs he incurred for repairing the damage caused thereby. The sole question raised is who is to bear these costs, petitioner or the United States. The court below held that they should be borne by petitioner. This holding is clearly correct under both the general law and the provisions of the contract here involved. Hence, we submit that review by this Court is unwarranted.

1. Under the general law it is plain that the risk of such hurricane damage was on petitioner. As part of his undertaking to construct War Housing Project Fla. 8246, Key West, Florida, petitioner was to reassemble the prefabricated houses moved from Mississippi. This obligation could not be discharged until the reassembled houses were completed and accepted as ready for use and occupancy by the United States. At the time the hurricane struck, none of the houses which were damaged had been completed or accepted as ready for use and occupancy by the United States. Accordingly petitioner could discharge his obligation to the United States to make the houses complete and ready for use and occupancy only by repairing the damage caused by the hurricane. The imposition of such risk of loss on the contractor is common not only where as here the act of God is foreseeable—petitioner's witness testified that hurricanes are common in that part of Florida (R. 51)—but also where the act of God is not foreseeable. *Day* v. *United States*, 245 U. S. 159 (extraordinary floods); *Phoenix Bridge Co.* v. *United States*, 211 U. S. 188 (unseasonable weather); cf. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184. "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States* v. *Spearin*, 248 U. S. 132, 136. See, also, *Dermott* v. *Jones*, 2 Wall. 1; cf. *Sickinger* v. *Bd. of Directors*, 147 La. 479; *Bd. of Education* v. *Townsend*, 63 Ohio St. 514.

2. (a) Conceding, *arguendo*, that the contract was one of bailment rather than one for construction,[3] the risk of such

[3] That petitioner would have to bear the losses stemming from the hurricane would follow *a fortiorari*, if the contract were construed as one for the construction of the housing facilities. "In many cases where a builder or contractor has undertaken to erect a building or other structure, it has been injured or destroyed without fault of either party while in

losses was nevertheless on petitioner, for the contract here involved explicitly imposed these risks on petitioner, and thereby enlarged his ordinary responsibilities as bailee. Cf. *Sturm* v. *Boker*, 150 U. S. 312; *Mulvaney* v. *King Paint Mfg. Co.*, 256 Fed. 612 (C. C. A. 2). Section 3 of Division DTH-1 of the contract, *infra*, p. 10, headed "Contractor's Responsibility," provides in unambiguous terms that "The Contractor shall be responsible for all buildings, fixtures, equipment and appurtenances to be moved and reerected, including any loss, breakage, or other damage thereto from date of Notice to Proceed until completion and acceptance of the project" (R. 94). Moreover, although Section 3 is not, as petitioner points out (Pet. 6), a part of the General Conditions, Section 19-a *infra*, p. 10 is. That section entitled "Care of Work" plainly provides in pertinent part as follows: "* * * The Contractor shall be fully responsible for damages to, loss of, or theft of any materials, supplies, or equipment supplied to the Contractor by the Government" (R. 94). In addition, Section 33-a, *infra*, p. 10, of the General Conditions states "The Government shall furnish the materials, supplies or equipment (if any) which the specifications state will be furnished by the Government. This property shall remain the property of the

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process of erection. It is uniformly held that the builder or contractor still remains bound by his promise, and will be liable in damages if he fails to complete the structure." 6 Williston, Contracts (Rev. Ed.) § 1964; *Mittry* v. *United States*, 73 C. Cls. 341, 358; 2 Restatement of Contracts § 467. And notwithstanding the view of the court below that the contract was one of bailment, it would seem more reasonable to construe it as a construction contract. Article 1 (Statement of Work) requires petitioner to perform the work "for construction of War Housing Project Fla.-8246, Key West, Florida" (R. 68). Moreover, petitioner was not only to move and reassemble the prefabricated houses, but he was to do the other work, such as installing utilities and grading the land, that was necessary to make the houses ready for occupancy. The fact that the Government was to supply many of the materials did not make the contract any the less a construction contract. Cf. *Sickinger* v. *Bd. of Directors*, 147 La. 479; *Bd. of Education* v. *Townsend*, 63 Ohio St. 514.

Government, but the Contractor shall be responsible for the loss or theft of these items;" and paragraph (c), *infra*, pp. 10-11 of that section goes on to state in part: "The Contractor shall replace the items at his own expense with items found by the Contracting Officer to be equal in quality to the items lost or stolen."[4] Finally, it is provided in Article 16(c), *infra*, p. 13: "All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work, * * *" (R. 79-80). Any one of these sections alone would in our opinion, have been adequate to support the holding below. Taken together, they unmistakably demonstrate that the risk of damages such as here involved was placed exclusively upon petitioner. Cf. *Wells Bros. Co.* v. *United States*, 254 U. S. 83.

(b) Petitioner, relying on *Fairmont Coal Co.* v. *Jones & Adams Co.*, 134 Fed. 711 (C. C. A. 7) and *The Gulfport*, 250 Fed. 577 (C. C. A. 5), certiorari denied, 248 U. S. 560, urges that Section 3 of Division DTH-1 does not enlarge his responsibilities beyond those of an ordinary bailee, but

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[4] Section 33 continues in paragraph e, *infra*, p 11: "If the Contracting Officer find that the Contractor has not used extraordinary care in caring for equipment or materials turned over to him by the Government, the Government may, at its option, exercise the rights conferred in Article 9 of the Contract regarding termination for fault of the Contractor. If the Government does not exercise the right, liquidated damages shall be assessed for resultant delays, including delays by the Government in obtaining replacements. If the Contracting Officer finds that extraordinary care was used and that notwithstanding the extraordinary care, the loss occurred, the Government shall not assess liquidated damages for resultant delays and may not terminate the Contract because of loss or theft of the items, but such finding shall not relieve the Contractor from the duty to replace or pay for the lost or stolen items as provided in c and d hereof."

only defines the time during which he was to be responsible. But the language of Section 3 is not limited to the bare provision that petitioner shall be "responsible" as was the situation in the *Fairmont Coal* case,[5] but goes on expressly to include within that responsibility "any loss, breakage, or other damage thereto." See *Mills Factors Corp.* v. *Ming Toy Dyeing Co.*, 41 F. Supp. 467 (S. D. N. Y.), ("full responsibility" held to expand common law liability of bailee); *Drake* v. *White*, 117 Mass. 10; *Commercial Acetylene Supply Co.* v. *Fox*, 47 Cal. App. 673; *Com'l Electrical Supply Co.* v. *Mo. Commission Co.*, 166 Mo. App. 332. And even if there were some merit to this contention, it in no way affects the full liability imposed on petitioner by Sections 19a and 33 of the General Conditions, or the sole responsibility discussed in Article 16(a), as to which the petition is silent.

(c) The court below held that Article 9(b) of the contract, *infra*, pp. 12-13, limited the breadth of the risks imposed on petitioner. However, as the court pointed out, the exemptions there contained relate only to losses caused by war, revolution and like events, and do not include losses due to acts of God (See R. 75). On the other hand, petitioner seeks to broaden these exemptions by claiming that Article 9(a), *infra*, pp. 11-12, which includes acts of God among the exemptions there enumerated should be applied. But that article treats with limitations on petitioner's liability for damages due to delay. In the absence of such a provision, petitioner would be held to the time stipulated in the original contract, even though delay were caused by an act of God. Cf. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184. Indeed, in the present case, petitioner completed

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[5] *The Gulfport, supra,* involved an ordinary bailment without even a contract provision to support an argument that the bailee had undertaken additional liabilities.

his work under the contract 108 days late and the liquidated damages assessable therefor was $150 per day for each calendar day of delay beyond the contract date until the work was completed and accepted (Special Conditions Par. 2). Since the contracting officer found that the delay was caused in part by the necessity of repairing the damage caused by the hurricane, he extended the time for completion by 108 days, relieving petitioner of all liability for liquidated damages. See Article 9(a) and Section 33-e, *infra* pp. 11-12.

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict of decisions. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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April, 1948.

APPENDIX

The pertinent contract provisions are:

1. Division DTH-1

Sec. 3. CONTRACTOR'S RESPONSIBILITY.

The Contractor shall be responsible for all buildings, fixtures, equipment and appurtenances to be moved and reerected, including any loss, breakage, or other damage thereto from date of Notice to Proceed until completion and acceptance of the project.

2. GENERAL CONDITIONS.

Sec. 19. *Care of Work.*

a. The Contractor shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance. The Contractor shall be fully responsible for damages to, loss of, or theft of any materials, supplies, or equipment supplied to the Contractor by the Government.

* * * * * * *

Sec. 33. *Consolidated Purchase of Dwelling Equipment.*

a. The Government shall furnish the materials, supplies or equipment (if any) which the specifications state will be furnished by the Government. This property shall remain the property of the Government, but the Contractor shall be responsible for the loss or theft of these items.

* * * * * * *

c. The Contractor shall replace the items at his own expense with items found by the Contracting Officer to be equal in quality to the items lost or stolen. If items of inferior quality are supplied with the consent of the Contracting Officer, an equitable reduction in the contract price shall be made.

d. If the Contractor is unable to supply the items, the Government will endeavor, at the Contractor's request, to obtain the necessary items. If the Government is successful, the Contract price shall be reduced by an amount equal to the highest current retail market prices for the articles lost or stolen and in determining said amount consideration shall be given to maximum price regulations.

e. If the Contracting Officer finds that the Contractor has not used extraordinary care in caring for equipment or materials turned over to him by the Government, the Government may, at its option, exercise the rights conferred in Article 9 of the Contract regarding termination for fault of the Contractor. If the Government does not exercise the right, liquidated damages shall be assessed for resultant delays, including delays by the Government in obtaining replacements. If the Contracting Officer finds that extraordinary care was used and that notwithstanding the extraordinary care, the loss occurred, the Government shall not assess liquidated damages for resultant delays and may not terminate the Contract because of loss or theft of the items, but such finding shall not relieve the Contractor from the duty to replace or pay for the lost or stolen items as provided in c and d hereof.

3. ARTICLE 9. (a) *Delays—Damages.*—If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of

the Contractor to proceed, the Contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the Contractor and his sureties shall be liable for the amount thereof; *Provided,* That the right of the Contractor to proceed shall not be terminated or the Contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the Contractor shall within 10 days from the beginning of any such delay (unless the Contracting Officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the Contract) notify the Contracting Officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the Contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

(b) The Contractor shall not be liable under this Contract for loss which is caused directly or indirectly by bombardment, invasion, civil war, insurrection, rebellion, revolution, military or usurped power or by operations of armed forces while engaged in hostilities (whether war be

declared or not), or by civil commotion arising from any of the foregoing. In the event damage is occasioned by any of the foregoing causes, the Contractor shall, if so ordered by the Contracting Officer, repair such damage under a Change Order stipulating the additional sum to be added to the contract price and the additional time for performance.

In the event the Government determines not to replace or repair such work, the Contract shall terminate upon notification by the Government to the Contractor in which event the Contractor shall be paid in accordance with the provisions in General Conditions regarding termination for the convenience of the Government.

4. ARTICLE 16. *Payments to Contractors.*

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(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the Contract.

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